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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-360

ROBERT LEE STEVENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BROWN AND NEWTON
By CHESTER L. BROWN
433 North Camden Drive, Suite 1200
Beverly Hills, California 90210
(213) 274-8274

Attorneys for Petitioner
ROBERT LEE STEVENS

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Attorneys for Petitioner
ROBERT LEE STEVENS

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NO. _____

ROBERT LEE STEVENS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, ROBERT LEE STEVENS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 3, 1979.

OPINION BELOW

The opinion of the Court of Appeals appears herein as Appendix "A" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered August 3, 1979. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Was "state action" present when bank investigators of federally insured banks promised the Petitioner immunity from prosecution in exchange for his cooperation?

STATEMENT OF THE CASE

Petitioner was convicted of making various false statements in procuring a loan from a federally insured bank. In 1975, Petitioner borrowed money from the United California Bank, pledging as collateral for the loan a certificate of deposit from the Bank of America. The Petitioner thereafter went into default on the loan with United California Bank, who attempted to collect on the collateral only to find that the certificate of deposit was a forgery. Petitioner had, prior to this time, repaid part of the loan.

In November of 1975, Petitioner was called into the United California Bank where bank investigators asked him questions concerning the collateral. Petitioner stated he wanted to talk with his attorney. On November 4, 1975, Petitioner met with Gerald Caminer, Bank of America Regional Investigator and Frank Northrop, United California Bank Loss Investigator. This meeting occurred at the office of Petitioner's attorney, Barry Menes. Caminer and Northrop advised Petitioner that if he promised to repay United California Bank the amount due on the loan, and tell Bank of America how and where he obtained the certificate of deposit, no criminal action would be initiated by either bank. A memorandum, prepared by Caminer, stated the promise as follows:

> "Northrop and the undersigned concurred with Stevens that if he signs a repayment agreement for UCB and disclose the Bank of America's employee's name, there won't be any criminal action

> initiated either by UCB or B of A against Stevens if he meets his payment schedule."

Petitioner agreed to this, and provided the Bank of America with the employee's name, and signed a new payment schedule with United California Bank. Thereafter, on November 9, 1977, the United California Bank called the Federal Bureau of Investigation and advised them of what Petitioner had told them. The Government had no information concerning this transaction prior to this time. On November 12, 1977, the Government began its investigation, which subsequently lead to Petitioner's indictment. At trial, it was not disputed that the criminal charges were the fruits of the Petitioner's admissions to the Bank officials.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, in affirming the instant conviction, places the stamp of approval on a practice of allowing the Government to initiate a prosecution and obtain a conviction based

upon the broken promises of bank officials, who themselves are agents of the Government for purposes of investigating and reporting bank losses.

It is a fundamental axiom of Constitutional law that the promises or representations made by the Government to defendants in criminal cases are binding on the Government through the Due Process Clause of the Fifth Amendment. Starting with Santobello v. New York, 404 U.S. 257 (1971), the Court has stated that these promises will be enforced by the courts in the exercise of their supervisorial powers and the Government will be required to specifically perform such arrangements. See, United States v. Alessi, 536 F.2d 978 (2nd Cir. 1976)

The progeny of Santobello has recognized that this principle is applicable to all levels of Government. The obvious reason is that historically, the various Amendments have been applied to the "Government" as limitations on their exercise of power. CF. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In cases

applying the Fifth Amendment to federal criminal matters, Santobello has been extended to require enforcement of agreements both of prosecutors and federal agents. United States v. Carter, 454 F.2d 426 (4th Cir. 1972) cert. denied, 417 U.S. 933; Matter of Doe, 410 F.Supp. 1163 (E.D. Mich. 1976).

In the Doe case, the Court stated:

> "In this limited contract the government may not rely upon distinctions between express, implied, and apparent authority among its agents in avoiding the effect of its promise. These distinctions have meaning for the legal technician, not the layman dealing with the 'government' in his negotiations. The solution to agents who bargain away the government's rights is tighter administrative control within the executive branch. (Citations omitted)"

In Doe, an FBI agent promised a defendant that he would not have to testify as to certain matters before a grand jury. The prosecutor, in spite of that representation nevertheless attempted to question the defendant about those matters. The court in Doe enforced the agent's promise.

The Government has maintained throughout this case that the actions of Caminer and Northrop were the actions of "private" persons, and hence not binding on the Government. However, the actions of private persons have on many occasions been held to constitute governmental action, especially so when the question of segregation has been in issue. Burton v. Wilmington Parking Authority, supra; Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1966), cert. denied, 353 U.S. 924 (1967). See also, Adams v. New Orleans, 208 F.Supp. 427 (E.D. La. 1962); Jones v. Marva Theaters, Inc., 180 F.Supp. 49 (D. Md. 1960).

The Petitioner respectfully contends that due to the amount of public control involved with federally insured banks, the actions of its agents should be considered

to be governmental action. It is unlikely that any other business activity is more heavily regulated by the Federal Government than banks. Each of these two banks, and more specifically their employees, come under rules and regulations of the Federal Deposit Insurance Corporation. Title 12, United States Code, et seq., governs the relationship between the FDIC and the various banks. The FDIC is a federal corporation, managed by those directors, including the Comptroller of the Currency and two persons appointed by the President. Title 12, United States Code, Section 1812. Under the statutes and regulations, insured banks are subject to strenuous operating requirements with respect to the maintenance of security. Title 12, United States Code, Section 1817, 1881, 1882. Failure to comply with these statutes and the regulations promulgated thereunder subjects the banks to civil penalties enforceable by the Department of Justice. Title 12, United States Code, Section 1884.

One of the reporting requirements has to do with non-bank employee larceny. Banks, such as these, must report such incidents to the Regional Director of the FDIC. 12 CFR Section 326.5(d). A report is made on Form P-2, which is forwarded to the Regional Director's office. The Regional Director's office, in turn reviews these forms. If the bank has not notified the FBI prior to the receipt of this form, the Regional Director's office will report the incident to the appropriate United States Attorney.

In sum, pursuant to both statutory compulsion and practice, all incidents of wrongdoing involving a bank, its employees and its insured deposits are brought to the attention of federal law enforcement officials. The party or parties making this report, fall under the ambit of the FDIC. That agency is a federal agency and an arm of the Government. See, Safeway Portland Employees Federal Credit Union v. Federal Deposit Insurance Corporation, 506 F.2d 1213, 1215 (9th Cir. 1974); Landy v. Federal Deposit Insurance Corporation, 486

F.2d 139 (3rd Cir. 1973), cert. denied, 416 U.S. 960. And, of course, the interview in question here was initiated and concerned itself with a bank employee of the Bank of America.

Being an arm of the federal government, and being required to report wrongdoing to the United States Attorney, differentiates Messrs. Caminer and Northrop from other "private" persons. Due to the amount of public control, See, e.g. Guillory v. Tulane University, 203 F.Supp. 855, 207 F.Supp. 554 (E.D. La.), aff'd. 306 F. 2d 489 (5th Cir.), on remand, 212 F.Supp. 674 (E.D. La. 1962), both Caminer and Northrop should be viewed as governmental agents.

The Ninth Circuit has previously held that the actions of private persons are tantamount to governmental action. In the sky-jacking cases, the Federal Aviation Administration promulgated regulations and procedures to be followed by the airlines in screening and searching boarding passengers. Following such searches, the argument was made that the Fourth Amendment

did not apply, as the actions involved "private" persons. This Court disagreed in several cases. United States v. Casada, 527 F.2d 1374 (9th Cir. 1975); United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), cert. denied, 416 U.S. 987.

The public interest in security of the airlines dictated the application of the Fourth Amendment to airline security personnel. The public interest in the security of banks should likewise dictate the application of the Fifth Amendment to bank examiners. The Petitioner justifiably relied on a promise not to institute criminal action. He agreed to repay a large loan, and provided information against a bank employee. The bank examiners intentionally lied to the Petitioner as evidenced by their memorandum, wherein they stated that they would contact the FBI as soon as the Petitioner signed a stipulated judgment for repayment of the money.

The banks in this case have used the federal government to turn a civil matter

into a criminal prosecution. They met with the Petitioner obstensibly to collect a loan in default, while all the time intending to turn the matter over for criminal prosecution. They acted as federal criminal agents, in part because the law does impose this requirement upon them. They want, to use the venacular, to have their cake and eat it too. The Petitioner relied on their representations, as did his attorney. As in Doe, the Petitioner thought he was dealing at arms length with the Government. This Court should enforce their promise, lest the term due process loses all meaning.

The decision of the Court below was basically a policy decision. The Court was reluctant to promulgate a rule allowing bank officials the power to grant immunity. However, policy consideration should weigh in favor of the Petitioner, to prevent the conduct here engaged in. The Government can prevent further abuses in this area by stricter control over bank officials. This approach is far more desirable than granting to those same

officials a license to lie.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHESTER L. BROWN
Attorney For Petitioner

BROWN AND NEWTON
Attorneys at Law

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	NO. 78-1884
v.	)	OPINION
ROBERT LEE STEVENS, Appellant.	)	

Filed: Aug. 3, 1979
Emil E. Melfi, Jr., Clerk
U. S. Court of Appeals

Appeal from the United States District Court for the Central District of California

Before: ELY and TRASK, Circuit Judges, and EAST,* District Judge

TRASK, Circuit Judge:

Robert Lee Stevens appeals from his conviction for making false statements to banks insured by the Federal Deposit Insurance Corporation in violation of 18 U.S.C. §1005. We affirm.

*Honorable William G. East, Senior United States District Judge, for the District of Oregon, sitting by designation.

I

Appellant was found guilty after a jury-waived trial on stipulated facts. He admitted that on January 9, 1975, he applied for a loan of $225,000 from the United California Bank and presented a stolen and forged Bank of America time certificate of deposit in the amount of $225,000 as security for that loan. The certificate had been stolen with the assistance of a Bank of America employee. Stevens signed the employee's name to the certificate and to a letter acknowledging that the certificate had been posted as security for the United California Bank loan. Stevens renewed the loan on February 2, 1976, again pledging the stolen and forged certificate as collateral. On March 10, 1975, he applied for a $125,000 loan from Gibraltar Savings and Loan; on January 20, 1976, he applied for a $5,000 loan from Lloyds Bank; on November 18, 1976, he applied for a $5,000 loan from Manufacturers Bank. In each instance the loan application failed to disclose Stevens' liability to United California

Bank.

Stevens made no payments on the United California Bank loan after February 1976. United California Bank presented the $250,000 certificate of deposit it held as collateral to the Bank of America on October 23, 1976, and learned the certificate was invalid. On November 4, 1976, United California Bank investigator Frank Northrup and Bank of America investigator Gerald E. Caminer met with Stevens' attorney, Barry Menes. Menes told the investigators that Stevens had informed him that two former employees of United California Bank and Bank of America had been involved in the theft and forgery of the certificate. Menes said Stevens might refuse to identify the employees because of the risk of self-incrimination. However, Menes indicated that his client might be willing to sign a repayment agreement.

Later that afternoon Stevens joined the meeting. Stevens' and Menes' version of what was said contrasts sharply with Northrup's and Caminer's account. According to Stevens and his lawyer, the bank

investigators promised that if Stevens signed a repayment agreement and disclosed the identity of the bank employees who helped him obtain the stolen certificate of deposit, the banks would not notify the FBI or otherwise initiate criminal proceedings against him. Relying on this so-called "promise of immunity from prosecution", Stevens said he would sign the repayment agreement, and he gave the investigators a detailed account of the theft and forgery of the certificate of deposit. At the conclusion of the meeting, Caminer prepared a memorandum which said the banks' representatives had orally promised not to initiate a prosecution against Stevens if he performed his part of the bargain. Northrup and Caminer later claimed the memorandum was inaccurate.

Five days after the meeting of November 4, 1976, a United California Bank official reported Stevens' incriminating statements to the FBI. A federal investigation resulted, and on September 19, 1977, a federal grand jury for the Central District of California indicted Appellant

on seven counts of making false statements to banks insured by the Federal Deposit Insurance Corporation and making a certificate of deposit without authority and with intent to defraud.

In a pretrial motion, Stevens argued that the bank investigators were de facto government agents, and he asked the district court either to decree specific performance of the alleged promise of immunity by dismissing the indictment or to suppress the confession and its fruits because they were obtained by means of a false promise. It is from the denial of this motion that Stevens now appeals. The district judge made no findings of fact regarding what, if any, promises were made. He reasoned that even if all of Stevens' allegations were true, the government was not bound by the investigators' promise of immunity because, as a matter of law, they were not government agents. We agree with the district court's analysis and likewise see no reason to resolve the factual dispute over what was

said at the November 4, 1976 meeting.

II

Under certain circumstances private actors are transformed into government agents by virtue of their involvement in a federally regulated crime prevention program. This doctrine is best illustrated by the airplane passenger search cases. In United States v. Canada, 527 F.2d 1374 (9th Cir. 1975), cert. denied, 429 U.S. 867 (1976), and United States v. Davis, 482 F.2d 893 (9th Cir. 1973), this court held that because federal regulations require privately employed airline security personnel to search passengers' carry-on luggage, such searches constitute state action for Fourth Amendment purposes. However, where the regulations do not specifically mandate the particular type of search engaged in, the airline employees' actions are deemed private in nature. See United States v. Gumerlock, 590 F.2d 794 (9th Cir. 1979) (en banc) (search of airfreight shipment held private); United States v. Ogden, 485 F.2d

536 (9th Cir.), cert. denied, 416 U.S. 987 (1973) (search of checked baggage held private).

Appellant analogizes his interrogation by bank investigators to the search of airplane passengers in Canada and Davis. According to Stevens, the interrogation and concomitant promise of immunity were mandated by federal regulations and were therefore government actions. Appellant points out that banks insured by the Federal Deposit Insurance Corporation are required to report wrongdoing to federal authorities. He says banks cannot discharge their duties without conducting investigations and interviews. To secure an interviewee's cooperation, promises of immunity are sometimes necessary, Stevens claims. Under appellant's theory, the federal regulatory scheme cloaks bank investigators with apparent authority to make such promises. In effect, bank investigators have been deputized as de facto government agents. And when government agents make promises to a person in order to induce him to incriminate himself,

the government must honor those promises. Santobello v. New York, 404 U.S. 257 (1971); United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975); United States v. Carter, 454 F.2d 426 (4th Cir.) (en banc), cert. denied, 417 U.S. 933 (1972). Appellant would have us hold that the bank investigators' promises bind the United States, just as the Securities and Exchange Commission investigator's promises bound the government in Rodman and the prosecutors' promises bound the government in Santobello and Carter.

We reject Stevens' arguments for two reasons. First, it requires an unreasonable stretch of the imagination to read into the banking regulations a provision granting private investigators, who are answerable to no one save their own employers, the power to confer immunity from prosecution. Second, in light of the fact that the investigators possessed sufficient information to comply with federal reporting requirements before they questioned Stevens, the interrogation and promise of immunity can only be regarded as gratuitous

private acts rather than as deeds performed at the government's behest.

As Judge Friendly, writing for the court in United States v. Solomon, 509 F. 2d 863 (2nd Cir. 1975), has observed, courts should be extremely reluctant to interpret a federal regulatory scheme as implicitly authorizing a private party to confer immunity from prosecution. In Solomon the court rejected the defendant's argument that interrogation by New York Stock Exchange officials were tantamount to questioning by federal agents. The court held that notwithstanding federal regulation of the Exchange, its investigatory functions were essentially private. In so holding, the Second Circuit noted that the consequence of deeming Exchange officials government agents would be to vest them "and many other similar bodies . . . with the power to grant use immunity." That would be highly injurious to justice, the court said, because the private groups could grant immunity "without any weighing of the need for the evidence against the undesirability of conferring an immunity

which goes beyond the testimony or information itself, and without the supervision of the Attorney General to which even government agencies are subjected." 509 F.2d at 870. Similar considerations militate against adoption of appellant's theory in the case at bar.

Even if Stevens' theory did have merit, his appeal would still fail because it is based upon a false premise. It simply is not true that the bank investigators had to interrogate Stevens in order to secure enough information to comply with federal banking regulations. To expose the fallacy in appellant's argument, we must first examine the statutes and regulations on which he relies.

12 U.S.C. §1881(3) describes the Federal Deposit Insurance Corporation as a "Federal supervisory agency." 12 U.S.C. §1882(a) requires each Federal supervisory agency to promulgate rules establishing minimum standards for banks "with respect to the installation, maintenance, and operation of security devices and procedures, reasonable in cost, to discourage

robberies, burglaries, and larcenies and to assist in the identification and apprehension of persons who commit such acts." 12 U.S.C. §1884 imposes a civil penalty of $100 a day for violations of the rules. 12 C.F.R. §326 prescribes the kinds of security devices banks must install and mandates certain reports. Appellant places particular emphasis on §326.5(d) which reads:

> "(d) External crime reports. Each time a robbery, burglary or nonbank employee larceny is perpetrated or attempted at a banking office operated by an insured state nonmember bank, the bank shall, within a reasonable time, file a report in conformity with the requirements of Form P-2. One copy of such report shall be filed with the appropriate state supervisory authority and three copies of such report shall be filed with the Regional Director of the Federal Deposit Insurance

> Region in which the main office of the reporting bank is located."

Form P-2 contains 38 questions. First the bank must describe where and when the crime was perpetrated, state whether it was a robbery, a burglary, or a non-employee larceny, and estimate the bank's losses. Then it must answer the questions set forth in the applicable subsection. If a robbery was committed, the bank must answer a series of questions about the robber's modus operandi, his appearance, his weapons, etc. If a burglary was perpetrated, the bank has to describe how the burglars gained entrance to the premises, what they broke into, and so forth. If the crime consisted of a non-employee larceny, the bank has to answer only one question:

> "32. Modus operandi of larceny (check one):
>
> a. (60) ___ Money or valuables where thief had access. Explain. _____
>
> b. (61) ___ Theft by trick or pretext;

Explain _____

c. (62) ___ Other,

specify _____

_____ "

In addition, all banks must state how long it took the police to respond, whether the perpetrators were arrested, and what types of security measures might prevent future crimes.

The record plainly shows that before Caminer and Northrup spoke with Stevens on November 4, 1976, they had in their possession all of the information they needed to answer every applicable question on Form P-2. They had learned from Menes that bank employees had stolen the certificates of deposit. Stevens' knowledge of the employees' criminality plus his use of the stolen instrument as collateral for a loan suggested that he, a non-employee, was somehow involved in the larceny. These were essentially the only facts the bank officials needed to know. They did not have to discover and disclose the dishonest employees' names or the exact means by which Stevens and his accomplices

committed the crimes. To comply with federal regulations, all the bank officials had to do was report Stevens' probable involvement and give a general indication of his modus operandi (i.e., state that Stevens did not steal the certificate himself but rather obtained it from a dishonest employee). The task of ferreting out Stevens' confederates from among the various employees who had access to certificates of deposit should have been left to the FBI.

United States v. Ogden, supra, and United States v. Gumerlock, supra, stand for the proposition that if federal regulations authorize a private party to conduct a specific kind of investigation and employees of the regulated entity take the enquiry one step further than the regulations require, the employees lose their status as federal agents vis-a-vis the ultra vires acts. Like the airline personnel who checked baggage and airfreight shipments, Caminer and Northrup went further than federal regulations told them to go. Consequently their acts were purely

private in character.

"A private person cannot act unilaterally as an agent or instrument of the state; there must be some degree of governmental knowledge and acquiescence." United States v. Sherwin, 539 F.2d 1, 6 (9th Cir. 1976) (en banc). There is not the slightest evidence that federal authorities encouraged or even knew about the banks' investigatory activities until several days after the November 4, 1976 meeting at which Stevens was interrogated and promised immunity. It is obvious that the investigators' foremost goal was not to serve the government but rather to protect their employers' financial interests; significantly, they made their promise of immunity conditional upon Stevens' signing a repayment agreement. Even if one of their objectives was to secure evidence for use against appellant in a criminal prosecution, Caminer and Northrup still cannot be considered de facto government agents. A mere purpose to assist the government is not sufficient in and of itself to convert a private actor into a government actor.

United States v. Gumerlock, supra, 590 F.2d at 800; United States v. Newton, 510 F.2d 1149, 1153 (7th Cir. 1975).

We hold that the bank investigators were acting in a private capacity when they questioned appellant, and therefore the government is not obligated to honor any promises of immunity they may have made. The district court's denial of appellant's motion to dismiss the indictment or to suppress the confession and its fruits was proper. Appellant's conviction is hereby AFFIRMED.